SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1943

No. 333

EARL MOORE, Appellant below, and
W. E. EDWARDS and D. L. LACEY, his sureties
on appeal, Petitioners

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee below and

PETITION FOR WRIT OF
PRAYER FOR ORDER
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OF

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SUPREME COURT
OF THE UNITED STATES

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No._____

EARL MOORE, Appellant below, and
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on appeal, Petitioners

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee below and Respondent

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

STATEMENT OF THE MATTER INVOLVED.

Earl Moore, for brevity herein referred to as petitioner, instituted this suit in the District Court

of the United States for the Southern District of Mississippi at Jackson for the recovery of wages. The suit was dismissed in the trial court on motion of the respondent for a summary judgment on a plea of res judicata. The petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit where the judgment of the trial court was affirmed on June 17, 1943 by an opinion which is reported in 136 Fed. (2d) 412.

The only question presented in this case is whether or not this right of action was merged into the judgment in the case of Earl Moore v. Illinois Central Railroad Co., 312 U. S. 630; 112 F. (2d) 959, where petitioner sued respondent for damages in September 1936 for his wrongful discharge from its employ in February 1933, and recovered $4,183.20 in said former action. Petitioner, as a member of a labor union having a contract with respondent for its members, sued in the District Court of the United States at Jackson, Mississippi, on account of a breach of the same contract of employment for the recovery of wages due him from September, 1936 to June, 1942. (R. 1-16). The respondent pleaded in the District Court that the judgment in the former action had been paid and was a bar to this action. (R. 17-27). The respondent moved for a summary judgment (R. 46-47) and said motion was sustained by the trial court on that ground. (R. 49-50). The petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit (R.52) where the judgment of

the trial court was affirmed on June 17, 1943, as aforesaid. (R. 63).

Petitioner's contract of employment was not for a fixed period of time but provided that it could be terminated only in a stated manner (R. 13) and his employment was never terminated in accordance with such provisions. The petitioner continued to proffer his services to the respondent as a trainman from the date of his discharge in February, 1933 but to no avail. This court held in the former action that petitioner was wrongfully discharged—not that the contract was ever terminated — and awarded him damages in the amount of $4,183.20 which were paid. The petitioner refused to release respondent from future damages in the payment of said judgment and declined to cash its check until such release was deleted therefrom. (R. 48-49). This suit is governed by the laws of the State of Mississippi. In Mississippi the rule is that a discharged employee may file a series of actions for wages as they become due or accumulate without impinging upon the res judicata rule; and that in a suit on a contract of employment of this nature, that of necessity each action must be brought only for the previously accrued wages. The petitioner in the former action sued for $12,000.00 as damages for breach of this contract. (R. 29-31). He was awarded the lesser amount of $4,183.20. This suit is for wages which have accrued to petitioner and matured since the filing of the former suit. The form of the former action in no way evinced any binding election to sue

for future damages for breach of such contract and this suit is not barred by such former action under the applicable rule in such cases in Mississippi.

II.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

On June 17, 1943, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the United States District Court in Mississippi which awarded the respondent a summary judgment dismissing this suit on the point stated. The jurisdiction of the District Court was founded on diversity of citizenship (R. 1-2) and the suit is controlled by the laws of Mississippi as the Circuit Court recognized. (R. 60). U. S. C. A., Title 28, Section 725, required the lower court to apply the law of Mississippi in deciding this case. The contract in suit was made with a labor union having thousands of members in the employ of the Illinois Central System, literally extending the full length and breadth of the State of Mississippi whose rights will probably be affected in future litigation if a rule in the Federal Court different from the State rule on the question is allowed to stand. The decision of the Circuit Court of Appeals is untenable and thereby erroneously decides an important question of local law in a way which probably conflicts with such applicable and controlling decisions of the Supreme Court of Mississippi on the question presented.

The Supreme Court of Mississippi holds where the period of employment is not fixed, that a separate cause of action arises as each pay day arrives and the wages mature. Each suit must be brought for all wages due at the time of the suit and a second action will not be allowed therefor. One such action, however, does not in any manner impair the injured party's right to bring a subsequent action, or as many subsequent actions as may be necessary for the recovery of subsequently maturing wages under the same contract. The rule is tersely stated in **Thorne v. True Hixon Lumber Co.**, 167 Miss. 266, 148 So. 388, as follows:

> "A contract is generally single, and a breach of it affords but one cause of action, but this court is aligned with those jurisdictions which hold that where wages are to be paid in installments during the execution of the contract, several suits may be maintained for accrued wages. Armfield v. Nash, 31 Miss. 361; Williams v. Luckett, 77 Miss. 394, 26 So. 967, 968. In the latter case, Williams had discharged Luckett, allegedly without cause, and Luckett sued for and recovered the wages for January, 1899. Thereafter he sued for wages accruing from February 1 to August 1, 1899, and in passing upon his right to recover in the second suit; the court said: 'If Williams had not discharged Luckett, but had failed to pay him as the monthly wages became due, it is clear that Luckett would have had a right of action accruing to

him at the expiration of each month of service, and might have sustained as many suits as there were defaults of payment. The bringing of the first suit for the January wages did not end the contract, nor amount to a rescission of it on the part of Luckett. The contract, notwithstanding the suit for damages for the nonpayment for the monthly sum of wages, remained in full force; and Williams might thereafter have received him back into his employ, or continued to subject himself to other suits for the continued breach of it. The contract, by its terms, is equivalent to the making of as many contracts as there are periods of payment, or at least the sums to be paid are divisible by its express terms; and the terms of the contract are the law of the contract.'

"This doctrine is applicable with particular force where, as here, the contract is not for a definite or fixed term, but the termination thereof is dependent upon contingencies which render it impossible to, at the time, definitely determine when it will expire."

Cf. **Armfield v. Nash,** 31 Miss. 361 (1856); **Williams v. Luckett,** 77 Miss. 394, 26 So. 967 (1899).

Such irreconcilable conflict in the Federal and State decisions on the question of res judicata should not be allowed to stand, particularly in view of the nature of the contract in suit. The petitioners should

be awarded the writ of certiorari to the lower court for a review of such proceedings under U. S. C. A., Title 28, Section 347(a) and Supreme Court Rule 38, Par. 5(b), because of such departure from and failure to apply the applicable and controlling decisions of the Supreme Court of Mississippi on this question.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Circuit Court had in the case numbered and entitled on its docket, No. 10,630, Earl Moore, Appellant, v. Illinois Central Railroad Company, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the court and for such further relief as to this court may seem proper.

Dated August 30, 1943.

Earl Moore,

By _____,

Counsel for Petitioners,
Jackson, Mississippi.

_____,

Of Counsel,
Jackson, Mississippi.

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1943

No._____

EARL MOORE, Appellant below, and
W. E. EDWARDS and D. L. LACEY, his sureties on appeal, Petitioners

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee below and Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURTS BELOW.

The opinion and judgment of the trial court appears at Record 49-50. The opinion of the Circuit Court of Appeals, reported in 136 Fed. (2d) 412, appears at Record 59-62.

II.

JURISDICTION.

1. The date of the judgment of the Circuit Court of Appeals to be reviewed is June 17, 1943. (R. 63).

2. The statutory provision which is believed to sustain the jurisdiction of this court is U. S. C. A., Title 28, Section 347(a) and Rule 38, Paragraph 5(b), of this court.

3. The petitioner's wages under the contract in suit were payable on the 15th and 30th days of each month for the preceding two weeks' period and were not payable in advance (R. 48). The respondent wrongfully discharged petitioner in violation of its contract with petitioner's labor union. While petitioner in the former action sued for $12,000.00, he sought as the proper measure of his damage the amount he would have earned under the terms of said contract with the respondent. (R. 31). No future damages were sought by that action. The petitioner was entitled by said action to recover only the wages which he would have earned to the date on which said action was filed in September, 1936. An amount less than such amount was actually awarded petitioner. Under the applicable decisions of the Supreme Court of Mississippi, the petitioner is entitled to maintain this action for his wages accrued and matured since the filing of the former

action and which were not included or recovered therein.

The question presented is important not alone because of the fact that the applicable and controlling state decisions were not followed and applied by the lower courts, but this contract under which petitioner was employed governs the rights of thousands of union employees of the entire Illinois Central system extending from one end of the State of Mississippi to the other and then across the entire state. The judgments of the lower courts are in irreconcilable conflict with the controlling decisions of the highest court of Mississippi on such question. One rule of res judicata in the Federal Court and a different rule in the State Court under such circumstances should not be allowed to stand. Under the rule in Mississippi, a series of suits may be brought for wages as they mature under a contract of employment without impinging upon the rule of res judicata. Where the contract of employment is for no definite or fixed period of time, the rule is that such suit must of necessity for obvious legal reasons be brought only for the wages which have previously accrued or matured. The jurisdiction of the trial court was founded on diversity of citizenship. (R. 1-2). The question presented is therefore controlled by the law of Mississippi where the contract

of employment was entered into and performed. The District Court and the Circuit Court of Appeals erroneously held that the judgment in the former suit was a bar to this action. (R. 49-50, 63). Such decision is in irreconcilable conflict with the decisions of the Supreme Court of Mississippi on the point.

4. The cases believed to sustain said jurisdiction are as follows:

Erie Railroad Co. v. Thompkins, 304 U. S. 64.

New York Life Insurance Co. v. Jackson, et al, 304 U. S. 261.

Ruhlin v. New York Life Insurance Co., 304 U. S. 202.

Vandenbark v. Owens Illinois Glass Co., 311 U. S. 538.

Moore v. Illinois Central Railroad Co., 312 U. S. 630.

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition at pages 3 to 6 which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERROR.

The Circuit Court erred in affirming the judgment of the District Court thereby holding that the judgment in the former case of Earl Moore v. Illinois Central Railroad Company, filed in September, 1936, is a bar to this suit for the recovery of wages accrued to him since the filing of said former action and not included therein.

V.

ARGUMENT.

The lower court in its opinion recognized in part the rule in Mississippi to be as contended by petitioners, viz:

> "(1) He may bring separate, successive suits after the due date of each salary payment for damages due and unpaid on the date the suit is filed, in which event recovery under the first suit does not prevent actions for damages subsequently accruing;" or (2) he may bring one suit for all damages, accrued and to accrue in the future, growing out of the breach." (R.60).

The court, however, held that petitioner had brought his first suit for all damages, both past and future, and that the recovery in the former action was a bar to this suit. It is significant in such con-

nection that the lower court was unable to cite any authority from Mississippi to sustain such announcement but relied upon **Pierce v. East Tenn. C. & I. R. Co.,** 173 U. S. 1; **McCargo v. Jergens,** 99 N. E. (NY) 838; **Cutter v. Gillette,** 163 Mass. 95; Sutherland on Damages, 4th Ed., Vol. III, Sec. 692; McCormick on Damages, Sec. 158.

An analysis of the proceedings in the former suit may be helpful here. The ad damnum clause of the declaration in the former suit (R. 31) fairly characterizes the nature thereof, viz:

> "That under and by virtue of the provisions of said contract, the minimum pay per day was $6.64 and if said plaintiff had not been discharged the said plaintiff would have worked a sufficient number of days as Number 52 on the original roster of November 13th, 1926, as amended by succeeding rosters, so that plaintiff would have earned the sum of $12,000.00, but because of the breach of said contract of employment and the arbitrary discharge of said plaintiff by defendants, as aforesaid, said plaintiff has earned nothing."

The lower court in its opinion (R. 61) said:

> "The declaration did not allege that Moore would have earned $12,000.00 within the period from February 15, 1933 to September 16, 1936."

With deference, the lower court was mistaken

in such statement because the declaration states just that—that the plaintiff **would have earned $12,000.00** but for his discharge. True enough, plaintiff could not and did not show that he would have worked during the period involved in the former suit enough to earn $12,000.00, consequently he was awarded the smaller amount. There is nothing in the declaration in the former suit to indicate that the plaintiff therein sought future damages. The lower court thought it significant enough to mention in its opinion that petitioner in the former suit was dissatisfied with the award of $4,183.20 and filed a motion to set aside that judgment assigning as one ground: "That no future damage was awarded." (R. 41). The trial court, however, correctly overruled that motion (R. 42) and thereby corrected such false impression of the plaintiff. The form of the action in either case certainly can have no controlling effect on the substantive right of the injured party to recover his subsequent damages. The measure of the petitioner's damages in either case was the amount he would have earned in the employ of respondent, less what he was able to earn in the employ of another. The wages on this contract of employment were payable on the 15th and 30th days of each month for the preceding two weeks' period of work. (R. 48). The plaintiff never renounced the contract and never elected to sue for all damages. Since his discharge "He has all time since said time offered his services to defendant under the terms of said contract, but the defendant has all since steadfastly declined to allow him to resume such employment." (R. 49).

There is simply nothing in the record to show that petitioner elected to recover all of his damages for breach of this contract in the former action. The lower court said that the litigants and court, however, treated the former suit as one for the recovery of all damages, past, present and future. With deference, the pleadings in that case do not justify such conclusion. That question was not presented as an issue to the court in the former case and any such statement to such effect was of necessity mere dictum. Naturally counsel sought to recover everything possible for his client on the first declaration and nothing in the argument or brief can change the nature of the case as contained in the first declaration.

In **Mississippi Power & Light Co. v. Pitts,** 179 So. 363, 181 Miss. 344, the Supreme Court of Mississippi, said:

> "The doctrine of estoppel is not available, because that doctrine has reference to factual matters, and not to contentions upon the law as applied to a given state of facts. There can be no estoppel where both parties were equally in possession of all the facts pertaining to the matter relied on as an estoppel, and the position taken in respect thereto involved solely a question of law. 21 C. J. p. 1231." * * * * "Arguments in the alternative upon a given state of facts are permissible and are heard every day in all our courts, and, in the interest of the law,

> rightly so. And the courts decide according to any of the alternatives they think tenable, or may decide according to a view of the law not argued at all, or even upon a point or points which counsel for both sides contend has nothing to do with the case."

Indeed, if it can be said that petitioner elected any course in this matter, it is submitted that this record shows that the petitioner has elected to treat himself as an employee of the company since the date of discharge. (R. 15, 16; 48-49). The respondent might have availed itself of his proffer of services at any time with effect. 12 Am. Jur., Section 390, pp.968-969; 13 C. J., Section 729, p. 655; Kentucky Natural Gas Corporation v. Indiana Gas & Chemical Corp., 7 CCA., 143 A. L. R. 484, cert. denied 63 S. Ct. 161.

The first declaration did not seek future damages and could not have sought a recovery of wages before they became due for obvious legal reasons. First, it could not be known how long the employee would be out of employment and how much he would earn elsewhere during his unemployment. Second, it could not be known when, if ever, this contract would be terminated according to its terms and there would be no manner of calculating damages without knowing the period of unemployment. The petitioner in the first suit was only entitled to recover the wages "due and unpaid on the date the suit is filed" as the lower court correctly stated in its opinion

in this case. (R. 60). Cf. **Gulf & C. Ry. Co. v. Hartley**, 41 So. 382, 88 Miss. 674. The court in the latter case said that a recovery could not be had of damages which occurred or accrued after the filing of the declaration. True, the petitioner in this case was awarded all damage in the first suit that the trial court thought he would have earned to November, 1936. (R. 36). While the declaration did not authorize such award, it is not contended that we are entitled to any wages on this contract prior to November, 1936.

The contract in suit was before the Supreme Court of Mississippi in the course of the first litigation between the parties as reported in 176 So. 593, 180 Miss. 276, where the Supreme Court said that the provisions of this contract "are practically identical with the one under consideration in **Moore v. Y. & M. V. R. R. Co.**, 176 Miss. 65, 166 So. 395, and **McGlohn v. Gulf & S. I. R. R.**, 179 Miss. 396, 174 So. 250."

In the latter case the court said:

> "We are of the opinion that the contract of the union was not void, **for the reason that it is terminable at the will of either party.** True it is that the employee was not bound to a state of servitude for life, and that the particular conductor here could have left the service if and when he pleased so to do. **The contract, fairly interpreted, is that the railroad company agreed**

> **with these employees that the length of service of the particular employee, so far as the railroad was concerned, would be until a trial—completely under the control of the employer**—should be had in accordance with article 30 and might be terminated in the manner therein provided; in other words, while the railroad company, generally, may have the right to terminate the contract at its will, **a solemn stipulation was made by it by which it is bound not to exercise such will in a summary manner, but in a certain well-defined manner and by a stipulated course of procedure. We conclude that this section was a material, substantial part of this contract by which appellant was induced to enter into and continue in this employment, and a part of the promised consideration therefor."**

Here we have a continuing divisible contract on which the petitioner has recovered damages for its breach to November, 1936. This suit is for a recovery of wages that he would have earned, less wages he has earned since that time to June, 1942, when the present suit was instituted. At all times since his discharge which this court has said was wrongful and without justification, the petitioner has continued to proffer his services and insist upon his right to work for the respondent as a member of this union. At any time during such period, the respondent may have availed itself of such proffer or it may have found cause to properly discharge

the petitioner according to its contract (R. 13) but has not done so.

Under such circumstances, the petitioner is entitled to bring a succession of suits for wages as they mature and would have been earned under this contract until it is terminated or cancelled according to its terms.

The rule of res judicata is a wholesome one in its proper office. The courts, however, are reluctant to extend its application and will never do so in a doubtful case.

In **Kelliher et al v. Stone & Webster,** 75 F. (2d) 331, it is said:

> " 'While the enforcement of the rule of res judicata is essential to secure the peace and repose of society, it is equally true that to enforce the rule upon unsubstantial grounds would work injustice.' City of Vicksburg v. Henson, 231 U. S. 259, 34 S. Ct. 95, 58 L. Ed. 209. 'According to Coke, an estoppel must "be certain to every intent"; and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.' Russell v. Place, 94 U. S. 606, 610, 24 L. Ed. 214."

The lower court, however, has extended the rule of res judicata beyond any limits recognized in Mis-

sissippi jurisprudence. While the lower court properly recognized the true rule contended for in this case, it failed to apply such rule in its decision thereof.

In **Cantrell v. Lusk,** 113 Miss. 137, 73 So. 885, the court said that a recovery of damages from a railroad for negligent construction and maintenance of its right of way for damages to one crop does not preclude a subsequent recovery for damages occasioned by the same condition to another crop.

In **Eminent Household of Columbian Woodmen v. Bunch,** 115 Miss. 512, 76 So. 540, in the syllabus it is said:

> "An action for permanent total disability, in which it was determined that he was not totally disabled, and was acting as a justice of the peace, was not a bar to a later action for disability at a later date when he was not acting as a justice, and the infirmities were the same, except that they had grown worse."

In **Commercial Credit Co. v. Newman,** 189 Miss. 477, 198 So. 303, the finance company sued out a writ of replevin for a Plymouth automobile when only some of its installments were delinquent and lost the case. After all of the installments on the contract matured, another replevin was instituted and the former suit was pleaded as res judicata. The court said that the plea was good only as to the notes

which were due and payable when the first action was instituted.

In **Williams v. Luckett,** 77 Miss. 394, 26 So. 967, Luckett sued Williams on a contract of employment and recovered judgment for $190.15 on a contract of employment commencing September 1, 1898, and ending September 1, 1899, at a salary of $50 per month payable monthly. The defendant discharged the plaintiff on January 2, 1899, without cause and he did no work thereafter. In February, 1899, he commenced suit and recovered $190.15 for his wages for the month ending January 31, 1899, and the judgment was satisfied. The present suit was for the balance of his wages due up to August, 1899. From February 1, 1899, plaintiff had earned $109.45 and had made diligent effort to obtain other employment and had failed. The lower court held that the former suit was res judicata in the second suit as to the terms of the contract and that it was a hiring by the month and not by the year. The defendant moved the court to direct a verdict for it on the ground that there had been a recovery for the breach of the identical contract sued on, and that plaintiff was barred of another recovery. This motion was overruled. The court said:

> "The ruling of the circuit court is sustained by the cases of Armfield v. Nash, 31 Miss. 361, and Davis v. Hart, 66 Miss. 642, 6 So. 318. It is insisted, however, that Armfield v. Nash is unsound, and that it is particularly overthrown

by Olmstead v. Bach, (Md.) 27 Atl. 501, 22 L. R. A. 74. That generally a contract is a single thing, and a breach of it affords but one cause of action, is often stated; but where the parties have made the contract divisible, or have made the payments due under it payable by installments at several periods during its execution, then the authority to bring several suits follows as a legal consequence. If Williams had not discharged Luckett, but had failed to pay him as the monthly wages became due, it is clear that Luckett would have had a right of action accruing to him at the expiration of each month of service, and might have sustained as many suits as there were defaults of payment. The bringing of the first suit for the January wages did not end the contr .ct, nor amount to a rescission of it on the part of Luckett. The contract, notwithstanding the suit for damages for the nonpayment for the monthly sum of wages, remained in full force; and Williams might thereafter have received him back into his employ, or continued to subject himself to other suits for the continued breach of it. The contract, by its terms, is equivalent to the making of as many contracts as there are periods of payment, or at least the sums to be paid are divisible by its express terms; and the terms of the contract is the law of the contract. Armfield v. Nash is supported by Wilkinson v. Black, 80 Ala. 329; Isaacs v. Davies, 68 Ga. 162; 14 Am. & Eng. Enc. Law 798, and authorities cited. We

see no sufficient reason for departing from Armfield v. Nash, and affirm the doctrine of it, as comporting with right and justice. Ramsay v. Brown (Miss.) 25 So. 151.

"Affirmed."

The procedure adopted by the petitioner in this case has long been approved in the jurisprudence of Mississippi. The rule announced by the court in Williams v. Luckett, supra, applies with special force to a case where as here, the contract is not for a definite term. The rule in that case clearly demonstrates the propriety of this second action on the same contract for the wages which matured after the filing of the first suit.

The petitioner's contention is forcefully announced by the court in Thorne v. True-Hixon Lumber Co., 167 Miss. 266, 148 So. 388, where Thorne sued the company on a contract of employment dated May 4, 1929, for wages at $4.50 per day straight except Sundays and furnish of a residence of the rental value of $20. Thorne was discharged without cause on January 15, 1931. He recovered one month's wages in the amount of $117.00 and this judgment was satisfied. Thereafter on February 13, 1932, Thorne filed his declaration in the same language against the company to recover his wages and the rental value of the residence for the period intervening between the filing of the first suit and the filing of the second. The company filed a plea of res judicata which was sustained by the trial court.

The Supreme Court in reversing the lower court said:

> "A contract is generally single, and a breach of it affords but one cause of action, but this court is aligned with those jurisdictions which hold that where wages are to be paid in installments during the execution of the contract, several suits may be maintained for accrued wages. Armfield v. Nash, 31 Miss. 361; Williams v. Luckett, 77 Miss. 394, 26 So. 967, 968. In the latter case, Williams had discharged Luckett, allegedly without cause, and Luckett sued for and recovered the wages for January, 1899. Thereafter he sued for wages accruing from February 1 to August 1, 1899, and in passing upon his right to recover in the second suit, the court said: 'If Williams had not discharged Luckett, but had failed to pay him as the monthly wages became due it is clear that Luckett would have had a right of action accruing to him at the expiration of each month of service, and might have sustained as many suits as there were defaults of payment. The bringing of the first suit for the January wages did not end the contract, nor amount to a rescission of it on the part of Luckett. **The contract, notwithstanding the suit for damages for the nonpayment for the monthly sum of wages, remained in full force; and Williams might thereafter have received him back into his employ, or continued to subject himself to other suits for the**

continued breach of it. The contract, by its terms, is equivalent to the making of as many contracts as there are periods of payment, or at least the sums to be paid are divisible by its express terms; and the terms of the contract are the law of the contract.'

"This doctrine is applicable with particular force where, as here, the contract is not for a definite or fixed term, but the termination thereof is dependent upon contingencies which render it impossible to, at the time, definitely determine when it will expire."

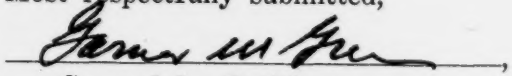
It is submitted with deference that no binding election can be read into the first suit so as to make it an action for future as well as past damages. The petitioner mistakenly sued for more than he could have earned but the gravamen of his action was the damage at $6.64 a day which he was denied the right to earn. He mistakenly averred that he would have earned $12,000.00. He could not have earned that much to the date of the filing of his first declaration and on that date he could not know and did not know just how long the respondent would continue to breach its contract. As each payday passed, the petitioner was entitled to institute a separate suit without being successfully met with a plea of res judicata. Likewise he was entitled to allow his wages to accumulate until such time as they would not be barred by the statute of limitations before suing therefor. Under the rule in Mississippi, the peti-

tioner has not elected to pursue any course inconsistent with or different from the rule entitling a succession of actions in such cases.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision of the Circuit Court.

Most respectfully submitted,



Counsel for Petitioners,
Jackson, Mississippi.

NOTE

Moore's first declaration filed under conformity statute. All forms of action in Mississippi abolished by statute. Relief is granted on concise statement of case. Section 521, Mississippi Code 1930, provides:

"* * *and it shall not be an objection to maintaining any action that the form thereof should have been different."

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 333

EARL MOORE, ET AL, *Petitioners*

VS.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent

RESPONSE OF THE ILLINOIS CENTRAL RAILROAD COMPANY TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES L. BYRD
Jackson, Mississippi
Attorney for Respondent.

VERNON W. FOSTER and
CHAS. A. HELSELL,
Chicago, Illinois

MAY & BYRD,
Jackson, Mississippi
Of Counsel.

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IN THE SUPREME COURT OF THE UNITED STATES

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No._____

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ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent

RESPONSE OF THE ILLINOIS CENTRAL RAILROAD COMPANY TO THE PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

STATEMENT OF THE MATTER INVOLVED

The petitioner undertakes to state the matter involved in pages three, four, five and six of the petition but we cannot agree with the statement in full and believe that it would be of interest to the Court to state the matter involved as we view it.

The petitioner instituted this suit in the District Court of the United States for the Southern District of Miss. at Jackson, Mississippi, seeking to recover wages alleged to be due him from September 16, 1936 to June 1, 1942. The

said wages were claimed to be due by reason of the fact that the petitioner, who at one time had been employed by the respondent as a switchman in the Jackson, Mississippi yards, had been wrongfully discharged by the respondent and that the petitioner was still an employee of the respondent and entitled to wages as a switchman since he had continuously offered his services to the respondent, which services had been declined.

The respondent filed its answer in the District Court, and also filed its motion for a summary judgment on the pleadings, based upon the affirmative defense set up in its answer and the amendment thereto, and upon the complaint of the plaintiff together with the transcript of the record in the United States District Court at Jackson, Mississippi in Docket No. 8086, at law, *Earl Moore, Plaintiff Vs. Illinois Central Railroad Company, Defendant.* (See record pages 46 and 47.)

The affirmative defense set up in the answer was that the petitioner herein, Earl Moore, had filed his suit against the respondent herein, Illinois Central Railroad Company, for damages for his wrongful discharge from its employment in February 1933 and recovered the sum of $4183.20 which was duly paid to him, and that in said former suit the said Earl Moore sued for all damages occasioned him by said wrongful discharge and he recovered in said suit damages to which he was entitled and that, therefore, the judgment in the former action became and was res adjudicata of the instant suit.

The motion for summary judgment was sustained. The petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit where the judgment of the trial court was affirmed on June 17, 1943.

The contract upon which the petitioner sued in both

instances was a contract designated "Schedule of wages and rules governing yardmen and switchtenders," which contract was entered into by and between the Illinois Central Railroad Company and the Brotherhood of Railroad Trainmen. The agreement, among other things, provided that the said yardmen or switchtenders taken out of service should have the right to a hearing, and in case suspension or dismissal is found to be unjust, yardmen or switchtenders should be reinstated and paid for all time lost. The provision is found in Paragraph D of Article 22 of the contract found at record page 13. In the first case, *Earl Moore Vs. Illinois Central Railroad Company*, 312 U. S. 630, this Court held that Moore was entitled to be paid for a breach of the contract in that he had been discharged without cause. This Court designated the action as a suit for damages in the following language:

> "Petitioner Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against respondent railroad company in a Mississippi State Court claiming that he had been wrongfully discharged."

(See *Earl Moore, Petitioner Vs. Illinois Central Railroad Co.*, 312 U. S. 630.)

As stated by the petitioner this suit is governed by the laws of the State of Mississippi.

It is true as stated by the petitioner that the rule in Mississippi is that a discharged employee may file a series of actions for wages as they become due or accrue without impinging upon the rule of res judicata but the Supreme Court of Mississippi has not held, as stated by the petitioner, that in a suit on a contract of employment of this nature that each action must be brought only for the previously accrued wages. On the contrary, the Supreme Court

of Mississippi holds that for breach of a contract of hiring the servant may sue and recover in one action all damages past, present and future. See *Pritchard Vs. Martin*, 27 Mississippi 305.

The petitioner in the former action sued for $12,000.00 as damages for breach of his contract of employment. He was awarded the sum of $4183.20.

He objected to the amount of the award and contended that his award should be increased on account of future damages which contention was, by the District Court, rejected.

The present suit is for wages alleged to have accrued to the petitioner since the filing of the former suit.

The petitioner states that the form of the former action in no way evinced any election to sue for future damages for breach of such contract and that this suit is not barred by such former action under the applicable rule in such cases in Mississippi. The form of the action, as well as the proceedings had in the case as reflected by the record, show that the petitioner in his first suit undertook to and did sue for and recover all damages sustained by him, past, present and future.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

As stated by the petitioner the jurisdiction of the District Court was founded on diversity of citizenship and the suit is controlled by the law of Mississippi. The action of the District Court of Mississippi was affirmed by the Circuit Court of Appeals on June 17, 1943.

The contract was made with a labor union with many members in the employ of the Illinois Central Railroad

Company, but it is denied that the decision of the Circuit Court of Appeals for the Fifth Circuit, or the decision of the District Court of Mississippi, which was affirmed by said Circuit Court of Appeals, established in the Federal Court a rule different from the State rule on this same question. It is denied that the decision of the Circuit Court of Appeals is untenable. And it is denied that said decision of the Circuit Court of Appeals decides an important question of local law in a way which conflicts with applicable and controlling decisions of the Supreme Court of Mississippi on the question presented. It is respectfully submitted that the decision of the Circuit Court of Appeals for the Fifth Circuit is supported by the decisions of the Supreme Court of the State of Mississippi, which is the court of last resort of said State, and instead of being in conflict with any of the decisions of the Supreme Court of the State of Mississippi, the decision is supported by and borne out by the decisions of the Supreme Court of the State of Mississippi. See *Pritchard Vs. Martin,* 27 Miss. 305.

The Supreme Court of Mississippi has held that where the period of employment is not fixed, and for that matter where the period of employment is fixed, a separate cause of action arises as each pay day arrives. The Supreme Court of Mississippi does not hold that an employee cannot sue in one suit for all wages due as well as for wages to become due under the contract. On the contrary, it holds that such an action is proper and permissible. *Pritchard Vs. Martin,* 27 Miss. 305.

In the case quoted from by the petitioner, *Thorne Vs. True-Hixon Lumber Company,* 167 Mississippi 266, 148 Southern 388, the Court states that separate suits *may* be maintained for accrued wages but no where in that opinion, or in any other opinion of the Supreme Court of Mississippi, does the Supreme Court hold that an employee *must* bring

a separate action for each month's wages or each week's wages as the same becomes due.

We respectfully submit that there is no real conflict between the Federal and State Court decisions on the question of res adjudicata and the petitioner should not be awarded the writ of certiorari applied for here, because there is no departure from or failure to apply the applicable or controlling decisions of the Supreme Court of Mississippi on the question involved herein.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

We respectfully disagree with the statements contained in paragraph three of page eleven of petitioner's brief under the heading "Jurisdiction." The petitioner sued for $12,000.00 in the former action but petitioner is mistaken in stating that no future damages were sought by that action. By examining the record pages 41 and 42 it will be seen that petitioner in the former suit sought to set aside the judgment giving him damages in the sum of $4183.20 and moved the court to re-assess the damages, and among the reasons assigned therefor, the reason that "no future damages were awarded." And clearly the petitioner was seeking additional damages which he claimed as future damages. This motion contradicts the statement made by the petitioner that no future damages were sought. Not only that, but the petitioner took a cross-appeal from the judgment of the District Court in his former suit basing his appeal on the contention that the damages awarded him were not enough. (See record page 43.) This action of the lower court was affirmed by the Circuit Court of Appeals as well as by this Court and the amount of the damages which Moore was held entitled to receive was fixed at $4183.20. The petitioner, Moore, in his first suit sued for $12,000.00, far in excess of any amount then due him by reason of any day wage or monthly wage due him,

because, as the Circuit Court of Appeals points out in its decision, the $12,000.00 which Moore sued for was more than $3,000.00 in excess of any amount he would have earned had he worked every day from the date of his discharge to the date of the judgment. (See opinion of the Circuit Court of Appeals, record page 60.)

We deny that under the applicable decisions of the Supreme Court of Mississippi the petitioner is entitled to maintain this action for his wages alleged to have accrued and matured. We submit that when the petitioner, in his former suit, sued for damages for breach of his contract of hiring, he did not sue for wages then due, but he sued for all damages, past, present and future. We again deny the statement made at page 12 of petitioner's brief that the judgment of the lower court is in irreconcilable conflict with the controlling decision of the highest court of Mississippi on such questions. We again deny that the Circuit Court of Appeals has established one rule of res judicata in the Federal Court as opposed to a different rule in the State Court. And we respectfully deny that where the contract is for no definite or fixed period of time, the rule is that such suits must of necessity be brought only for the wages which have previously matured or accrued. The District Court and the Circuit Court of Appeals did not err in holding that the judgment in the former suit was a bar to the present action and we submit that the decisions are not in conflict with any decisions of the Supreme Court of Mississippi on the point. The cases cited under paragraph four of the heading, "Jurisdiction" are not applicable in the instant suit for the reason that each of the cases cited beginning with *Erie Railroad Company Vs. Thompkins*, 304 U. S. 64 and ending with *Moore Vs. Illinois Central Railroad Company*, 312 U. S. 630, is decided upon the proposition that the United States Court, in each instance, erroneously applied the general law covering a particular question

rather than deciding the question on the applicable state law.

In the instant case the Circuit Court of Appeals and the District Court passed upon and decided the case on the applicable law of the State of Mississippi as construed by the highest court of the State of Mississippi and, therefore, the cases cited are inapplicable and furnish no basis for the granting of the writ of certiorari prayed for in this case. The petitioner accurately quotes from the opinion of the Circuit Court of Appeals but states that such holdings recognize only in part the rule in Mississippi. The Circuit Court of Appeals held that for a breach of contract of hiring, the servant has at least two remedies under the Mississippi law:

"1. He may bring separate suits after the due date of each salary payment for damages due and unpaid on the date the suit is filed, or (2) he may bring one suit for all damages, accrued or to accrue in the future, growing out of the breach." (See record page 60.) The Court further held that the "entering of a final judgment in an action under the latter option prevents recovery in another action for breach of the same contract." The Supreme Court of Mississippi, in the case of *Pritchard Vs. Martin*, 27 Mississippi 305, in passing upon the right of a discharged employee to sue for past as well as future wages for unjustified breach of contract of hiring, said:

> "The ground of this action is, that the defendant violated his contract with the plaintiff, and unjustifiably and without reasonable cause discharged him from his employment, and thereby caused a loss to him of his year's wages. It is well settled that where the employee is prevented by the employer, without reasonable ground, from performing his contract, he may sue upon the special contract and recover damages to

> the amount of the actual loss sustained, which will consist of the value of the service rendered, and the damages sustained by the refusal to allow performance of the rest of the contract: 21 Wend. 457; 24IB, 304; 1 Gilm. 562; 2 Verm. 84; 1 Denio, 317; LB 602; Ib. 606; and that the action may be brought immediately upon the breach of the contract by the employer, and that the plaintiff may recover not only for damages actually sustained previous to the commencement of the action, but for such as may occur in consequence of, and after the breach, and within the contemplation of the contract. 4 Peters, 182; 9 Ala. R. 292."

This case has never been modified nor overruled by any decision of the Supreme Court of Mississippi. The decision of the Circuit Court of Appeals refers to this decision as will be seen by the reference to note two to the opinion of the Court, record page 59.

But the petitioner complains that the Circuit Court of Appeals cited no Mississippi cases to sustain the announcement that where a suit has been brought for all damages accrued and to accrue in the future growing out of the breach and judgment has been rendered thereon and said judgment paid, that the cause is then res judicata as to all claims for damages. While the Circuit Court of Appeals was under no duty to make such citation, ample authority exists in the decisions of the Supreme Court of Miss. In the Case of *Bates Vs. Strickland*, 139 Mississippi 636, the Supreme Court of Mississippi said:

> "Appellant contends that the former cause is not res adjudicata of the questions involved in this cause, because they were not presented by the pleadings, nor passed upon by the court in that cause. It is true they were not specifically presented by the pleadings.

"In determining whether a question is res adjudicata the following principles of law should be kept in mind: That a judgment is presumed to be correct where there is any possible state of facts to justify it. Starling Vs. Sorrell, 134 Miss. 782, 100 So. 10; Duncan Vs. McNeill, 31 Miss. 704; Henderson Vs. Winchester, 31 Miss. 290; Cannon Vs. Cooper, 39 Miss. 784, 80 Am. Dec. 101.

"And that where a court has jurisdiction of the subject matter and the parties in interest, its judgment is not alone res adjudicata of the questions actually presented by the pleadings, but is also res adjudicata of all questions necessarily involved, and which could have been presented. Dean Vs. Board of Supervisors, 135 Miss. 268, 99 So. 563; Vinson Vs. Colonial and U. S. Mortgage Co., 116 Miss. 59, 76 So. 827; Harvison Vs. Turner, 116 Miss. 550, 77 So. 528; Hardy Vs. O'Pry, 102 Miss. 197, 59 So. 73; Fisher Vs. Browning, 107 Miss. 729, 66 So. 132 Am. Cas. 1917 C, 466."

And in the case of *Dean, et al Vs. Board of Supervisors of DeSoto County*, 135 Miss. 268, 280, 99 So. 563, the court said:

"Where a court has jurisdiction of the subject matter and parties to the cause, its judgment rendered in such cause is not alone res judicata of the questions actually presented by the pleadings, but all questions necessarily involved and which could have been presented."

And in the case of *Harvison Vs. Turner*, 116 Miss. 550, 77 So. 528, the Supreme Court of Mississippi said:

"Where the pleadings in a case present issues involved in said case which might have been litigated therein, as well as those actually litigated, they are res

adjudicata. Hardy Vs. O'Pry, 102 Miss. 197, 59 So. 73. It would therefore follow that, even if the lower court in the first case, through inadvertence or mistake, failed to pass upon the title and equities to the the timber in Perry County, since it was a matter in issue in the pleadings and proper to decide in order finally to dispose of the litigation between these parties, by the decree it became res judicata."

Authorities could be multiplied on this point, but we think it can not be successfully controverted that the rule in Mississippi is the same as it is in all jurisdictions of which we have any knowledge, that when a litigant has submitted his cause to the Court and has been successful in his suit and has reaped the fruit of his judgment, he cannot then re-litigate the question of damages nor can he again require the defendant to respond in damages because, perchance, he thinks that he did not receive enough damages.

The Supreme Court of Mississippi is not alone in its holdings on this question. This Honorable Court in the case of *Frank H. Pierce Vs. Tenn. Coal, Iron and Railroad Company,* 173 U. S. 1, in passing upon a case where the railroad company promised to pay one of its employees who had been injured by its cars, certain wages and to furnish him with certain supplies as long as his disability to do full work continued by reason of his injuries, in settlement of the employee's claim for damages for the injuries and when the railroad company abandoned the contract and discharged the employee without cause, held that the employee might maintain an action, once for all, as for a total breach of the entire contract and might recover all that he would have received in the future as well as in the past if the contract had been kept, deducting, of course, any sum which he might have earned in the future. This court said:

"If these facts were proved to the satisfaction of

the jury, the case would stand thus: The defendant committed an absolute breach of the contract, at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see if the defendant would change his decision and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract has been kept. In so doing, he would simply recover the value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract. The difficulty and uncertainty of estimating damages that the plaintiff may suffer in the future is no greater, in this action of contract, than they would have been if he had sued the defendant, in an action of tort, to recover damages for the personal injuries sustained in its service, instead of settling and releasing those damages by the contract now sued on."

This case is not in conflict with the decisions of the Supreme Court of Mississippi, but on the contrary, is in line with the case of *Pritchard Vs. Martin*, 27 Miss. 305, hereinbefore quoted from.

The case of *Pritchard Vs. Martin*, 27 Miss. 305, was referred to and approved in the case of *Friedlander Vs. Pugh, Slocomb*, 43 Miss. 111 at page 119 of the report.

The petitioner disagrees with the statement in the opinion of the Circuit Court of Appeals, wherein it refers

to the declaration in the former suit by Moore and says:

> "The declaration did not allege that Moore would have earned $12,000.00 within the period from February, 15, 1933 to September 16, 1936."

We think that an examination of the declaration will bear the Court out in its statement. At record page 31 is found the allegation as to the damages which the plaintiff claims he suffered. The plaintiff does state that he would have earned the sum of $12,000.00, except for the breach of contract, but he did not undertake to set out the period within which he would have earned the $12,000.00 As a matter of mathematical calculation the plaintiff would not have earned $12,000.00 at the rate of $6.64 per day for the period between February 14, 1933 to September 16, 1936. The Circuit Court of Appeals said:

> "Indeed, if he had worked every day in that period at the rate of pay alleged, he would have received less than $9,000.00."

It is clear from the allegation of the declaration, based upon the actual rate of pay, that the plaintiff sought to recover, not only what he might have earned from the date of his discharge up to the filing of his first declaration, but he sought to recover a large sum in addition thereto, and when he was not awarded that sum, he sought a new trial as has been pointed out herein.

We submit that there is in the record sufficient evidence of the plaintiff's efforts to recover in the first suit all of his damages to warrant the court in so holding.

The Supreme Court of the State of Mississippi, which passed on the first case of *Earl Moore Vs. The Illinois Central Railroad Company*, in passing upon the case said:

> "The appellant is not seeking to be restored to the appellee's employment nor does his complaint involve any question of discipline or policy arising under the contract. It includes only his right, vel non, to damages because of his alleged discharge by the appellee . . . ." (See Moore Vs. Illinois Central Railroad Co., 180 Miss. 286.)

In that case the Supreme Court reversed the lower Mississippi Court and when the case was reversed, the petitioner amended the ad damnum clause of his declaration so as to claim $12,000.00 as damages, whereupon the case was removed to the District Court of the United States on the grounds of diversity of citizenship. That case was then tried in the District Court, appealed to the Circuit Court of Appeals, and finally to this Honorable Court where the decision of the District Court awarding Moore the sum of $4183.20 was affirmed and that judgment was paid. In the District Court, in his opinion, the District Judge treated the case as one to recover full damages for the breach of the contract and in that opinion, found at record page 34 to 37 inclusive, he said:

> "I think the rule of damages is that the plaintiff is entitled to recover all damages that he suffered as a proximate result of the breach of the contract—not up to the time of the filing of the declaration, but for all damages that accrued to him as a proximate result of the breach less any amount that he may have earned for himself."

And the District Court further considered that the suit was for damages, past, present and future, as shown by the same opinion, at page 36 of the record herein, where the Court says:

> "The records show that he (Moore) was employed

in November 1936, at a salary of $105.00 per month, which, of course, is more than he would have earned had he continued in the employment of the Railroad Company."

And in the same case the District Court made findings of fact and conclusions of law, which will be found at record pages 37 to 41, inclusive. (Page 39 for finding of fact.)

By finding of fact No. 11, the Court found:

"11. That by a breach of the contract the plaintiff has suffered damages, but that he has not shown by the evidence that he would have worked every day and is not entitled to establish his damages by the number of days that were worked by Cutler."

By finding of fact No. 15, the Court found as follows:

"15. That in November 1936, plaintiff was employed by the Government at a salary of $105.00 per month and has not suffered any damages by reason of the breach of the contract since that time."

By its conclusions of law, the Court found as follows:

"3. The contract in the present case was a valid contract and the plaintiff was entitled to sue for a breach thereof, as was held in the case of Moore Vs. I. C. R. R. Co., 176 So. 593; McGlohn Vs. G. & S. I. R. R. Co., 174 So. 250."

And by its conclusions of law No. 4, the Court said:

"The rule of damages is that the plaintiff is entitled to recover all damages that he suffered as a proximate result of the breach of the contract, less any amount that he may have earned for himself."

After the District Judge had made his findings of fact and conclusions of law and awarded to the plaintiff, Moore, judgment in the sum of $4183.20, Moore filed a motion for a new trial seeking to have his damages re-assessed and one of the grounds of said motion was that no future damage was awarded. (R. page 41). That motion was overruled. (R. page 42.) From that action of the District Court, Moore took an appeal to the Circuit Court of Appeals (Record page 43) and the Circuit Court of Appeals affirmed the case on Moore's appeal.

We have, therefore, plaintiff suing for $12,000.00 which is a great deal more than the total of his wages for the period from the date of his discharge to the date of the filing of his suit, contending that the damages awarded to him on his claim were insufficient.

He perfected his cross-appeal to the Circuit Court of Appeals and in briefing his case, he still contended that the action was one for a lump sum for the breach of his contract of employment. At page one of his brief, filed in the Circuit Court of Appeals, at record page 44, he said:

> "It will be noted from the declaration (Tr. pp 1-3) that this is a suit by Moore, appellee, against the Illinois Central Railroad Company, appellant, for a lump sum for damages for the breach of a contract of employment."

And in the same brief, at page 23, record page 44, he said:

> "The cases cited by appellant are not cases involving the individual personal and property rights of an individual which he has sought to enforce in court. They are not cases wherein a discharged employee, who by reason of such discharge, has long since lost all of his rights as an employee, has brought suit in a

Court of law seeking to recover a lump sum of money as damages for his wrongful discharge in breach of his contract of employment as is involved in the instant case."

And again on page 47 of his brief, record page 45, he said:

"The District Court in awarding appellee damages followed the correct rule of law, to-wit: That is, appellee was entitled to recover all damages suffered as a proximate result of the breach of contract, less any amount which he may have earned for himself."

And again on page 51 of his brief, record page 45, he said:

"Thus, it was right, just and proper that appellee recover not only what he had actually lost in wages by reason of his wrongful discharge up to the time of the trial, but in addition thereto a reasonable amount as damages on the basis of his future loss."

Can it be doubted, in the light of the foregoing, that the issue in the case as made by the pleadings and as made by the plaintiff's contentions, was, whether there was a breach of the contract and if so, that the damages sought were for past, present and future damages?

The Circuit Court of Appeals in deciding the former suit of *Illinois Central Railroad Company Vs. Moore*, 112 Federal 2d 959, in the majority opinion, at page 962 of the report, said:

"On September 25, 1936, Moore sued the Illinois Central Railroad Company in a court in Mississippi for damages for his discharge . . . . ."

The dissenting Judge of the Circuit Court of Appeals held that the suit was one for damages for breach of contract. (See 112 Federal 2d 967.)

The petitioner herein, Moore, sought a review of the decision of the Circuit Court of Appeals in the first case and in his petition to this Court for certiorari, at page 2 thereof, said:

> "Petitioner filed his suit here involved against the respondent railroad company for a lump sum as damages for the breach of a contract of employment." (Record 45.)

And again in his brief on certiorari he states, at page 9 of said brief:

> "This suit was and is clearly a suit for damages for the breach of said written contract." (Record 45.)

This Honorable Court granted certiorari and the plaintiff, Moore, petitioner, filed in the Supreme Court a brief and in that brief he made certain statements as to the nature of the suit. On page 4 of that brief, we find: (Record 46)

> "It will be remembered that this is a straight-out action at law, a suit for damages for the alleged wrongful breach of a contract of employment, which said breach arose on February 15, 1933; a suit by a discharged employee because he was discharged in violation of his contract of employment. He is in no sense seeking reinstatement. This is not a dispute growing out of a grievance, or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. After February 15, 1933, petitioner was no longer an employee of the respondent."

And on page 5 of his brief we find the following: (Record 46)

> "We respectfully submit that a suit as is this by a discharged employee for damages for a wrongful breach of a contract of employment does not come within the purpose as set forth.
>
> "Here as discharged employee, who by reason of such discharge, has long since lost all of his rights as an employee, has brought suit in a court of law seeking to recover a lump sum of money as damages for his wrongful discharge in breach of his contract of employment."

This Honorable Court in its opinion in the former case, *Earl Moore Vs. Illinois Central Railroad Company,* 312 U. S. 630, said:

> "Petitioner Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against respondent railroad company in a Mississippi State Court, claiming that he had been wrongfully discharged . . . . ."

The District Court and the Circuit Court of Appeals in the instant case had before it the record in the former suit as well as the record in this case, including the brief herein before quoted from. See Stipulation R-28, R. 44-45-46. And with this evidence before it, the District Court found that the petitioner did in his former suit sue for all damages past, present and future and this decision of the District Court was affirmed by the Circuit Court of Appeals. There is nothing in the record to the contrary, and the petitioner in the instant case has not pointed out any fact which would justify this court in holding that the lower court erred in finding as a matter of fact that the plaintiff did sue for all damages in the prior suit.

Petitioner boldly asserts, in the face of the record, that future damages were not claimed and that the former action was merely one for wages which had accrued, but we respectfully submit that the record does not bear out that assertion, but on the contrary, the record shows that the petitioner sued for past, present and future damages and sought to recover full damages in the former action and the judgment in the former action has been paid. The petitioner now seeks to re-litigate the question of damages. At page 18 of his brief, the petitioner claims that he has elected to treat himself as an employee of the Company since the date of his discharge, but we respectfully submit that the petitioner and his counsel have evidently overlooked the statement made in the former case that the plaintiff was a discharged employee with no further rights as an employee, that he was not seeking reinstatement but was merely seeking damages for his wrongful discharge. (See R. 45-46).

The first declaration did seek more than the wages which would have been due at the time the suit was filed, as a mathematical calculation will demonstrate, and it is no answer to the contentions that future damages were sought to say that it could not be known how long the employee would be out of employment or how much he could earn elsewhere during his unemployment and that it could not be known when the contract would be terminated and there could be no means of calculating damages without knowing the period of unemployment.

This Court has settled this question adversely to the contentions of the petitioner as pointed out in the case of *Pierce Vs. Tenn. Coal, Iron and Railroad Company*, 173, U. S. 1, 43 U. S. Law Ed. 591, as the court said:

> "The difficulty and uncertainty of estimating damages that the plaintiff may suffer in the future, is no

greater in this action of contract, than they would have been if he had sued the defendant, in an action of tort, to recover damages for the personal injuries sustained in its service, instead of settling and releasing those damages by the contract now sued on."

The Supreme Court of Mississippi in the case of *Montgomery Ward and Company Vs. Hutchinson,* 173 Miss. 701, says that a party breaking a contract cannot escape liability because of the difficulty in finding a perfect measure of damages. It is enough, says the court, that the evidence furnishes data for an approximate estimate of the amount of such damages.

So the argument that the plaintiff in the former suit would have had difficulty in measuring his damages will not stand.

We deny that the lower court has extended the rule of res judicata beyond any limit in Mississippi and we deny the lower court failed to apply the true rule of res judicata.

The cases cited by the petitioner such as *Cantrell Vs. Lusk,* 113 Miss. 137 which was a suit for recurring trespass, or *Eminent Household of Columbian Woodmen Vs. Bunch,* 115 Miss. 512 which was an action to recover total and permanent disability, which was brought at a later date than a previous action for disability, or the case of *Commercial Credit Company Vs. Newman,* 189 Miss. 477, which was a suit in replevin on an installment contract wherein a second action was instituted after failure of a suit on a former installment, are not in point here. Those are cases where there was a continuing trespass and each day that trespass continued, there was a separate cause of action, or where there was a separate cause of action on each installment, but none of the authorities above cited are similar to the case under consideration.

The lower court found from the facts, and the Circuit Court of Appeals affirmed the finding, that the plaintiff sued for past, present and future damages, embracing in his first suit all of the claims embracing any particular periods of time. Such holding is not in conflict with *Williams Vs. Luckett*, 77 Miss. 394. There Luckett sued only for the wages due but did not undertake to sue for future wages and the Court held that one suit for wages would not bar a suit for wages that became due after the first suit was tried and judgment rendered.

That ruling is recognized as correct but the Circuit Court of Appeals, in its opinion in the instant suit says that there are at least two alternative remedies under the law in Mississippi which may be invoked by a discharged employee. One, to sue for wages as they accrue, as was held in the case of *Williams Vs. Luckett*, 77 Miss. 394, or two, sue for the breach of the contract and recover in one action all damages past, present and future, as was held in the case of *Pritchard Vs. Martin*, 27 Miss. 305.

Clearly an examination of these authorities will show that the Circuit Court of Appeals correctly recognized and applied the decisions of the highest court of the State of Mississippi.

The case of *Thorne Vs. True-Hixon Lumber Company*, 167 Miss. 266, is not in conflict with holdings of the Circuit Court of Appeals in the instant case. In the True-Hixon Lumber Company case, the court recognizes the rule that where wages are to be paid in installments, several suits *may* be maintained for accrued wages, but it does not hold in the True-Hixon Lumber Company case that a discharged employee may not maintain one suit and recover all damages accrued and to accrue for breach of a contract of hiring. On the other hand, the Courts of Mississippi recognize that right as is held in *Pritchard Vs. Martin*, 27 Miss. 305,

Friedlander Vs. Pugh, Slocomb and Co., 43 Miss. 111. In the case of *Batesville Southwestern Railroad Company Vs. Vick*, 134 Miss. 480, the Supreme Court of Mississippi, in passing upon the measure of damages which a discharged employee may recover, says that he is entitled to recover the amount he would have received if he had been permitted to keep his contract, less what he has earned in the meantime or what he might have earned in time spent in seeking employment.

One vital point which the petitioner overlooks is that the District Court in the former suit held as a matter of fact that the plaintiff would not suffer any damages in the future by reason of his discharge because of the fact that he, Moore, was employed in November, 1936 by the U. S. Government at a salary of $105.00 and has not suffered any damage by reason of the breach of the contract since that time. (See record page 40). The Circuit Court of Appeals affirmed this decision of the lower court since it affirmed the case on cross-appeal by the petitioner, Moore, and the Supreme Court of United States affirmed that finding because it reinstated the judgment of the District Court and awarded to Moore the original amount found to be due him by the District Court, to-wit: $4183.20.

CONCLUSION

We respectfully submit that an examination of the record in this case will show that the District Court found from the evidence that the plaintiff in his first suit recovered all damages to which he was entitled, past, present and future, and that this finding was approved by the Circuit Court of Appeals in affirming the case in accordance with the applicable law of the State of Mississippi as announced by the Supreme Court of Mississippi, the highest court of the State of Mississippi, and that when the record is considered, it will readily appear that the instant case is

merely an attempt on the part of the petitioner to re-litigate the question of his damages which has heretofore been litigated and which has heretofore resulted in a judgment for the petitioner, which has been paid and satisfied.

We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

James L. Byrd, Jackson, Miss.
Attorney for Respondent.

Vernon W. Foster and
Chas. A. Helsell, of Chicago, Ill.

May and Byrd, Jackson, Miss.
Of Counsel.